

Last page of docket
SHOW

PROCEEDINGS AND ORDERS

DATE: [06/15/88]

CASE NBR: [87100725] [CFX]

CASE STATUS: [

]

SHORT TITLE: [Cutillo, Michael

]

VERSUS

[Cinelli, Arthur

]

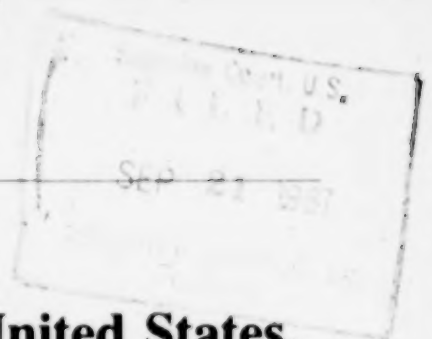
DATE DOCKETED: [092187]

PAGE: [01]

*****DATE*****NOTE*****PROCEEDINGS & ORDERS*****
Sep 21 1987 Petition for writ of certiorari filed.
Dec 2 1987 DISTRIBUTED. January 8, 1988
Jan 2 1988 Response requested. (Due February 1, 1988)
Apr 6 1988 REDISTRIBUTED. April 22, 1988
Apr 19 1988 Brief of respondent Arthur J. Cinelli in opposition filed.
Apr 19 1988 Motion of respondent for leave to proceed in forma
pauperis filed.
Apr 25 1988 REDISTRIBUTED. April 29, 1988
May 2 1988 Motion of respondent for leave to proceed in forma
pauperis GRANTED.
May 2 1988 Petition DENIED. Dissenting opinion by Justice White
with whom The Chief Justice and Justice O'Connor join.
(Detached opinion.)

87-725

No. - .



**In the
Supreme Court of the United States.**

OCTOBER TERM, 1987

**MICHAEL CUTILLO AND ROBERT NUNEZ,
PETITIONERS,**

v.

**ARTHUR J. CINELLI,
RESPONDENT.**

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit.**

**IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400**

**Counsel of Record*

Question Presented.

Does a defendant police officer in a civil rights action brought pursuant to 42 U.S.C. § 1983 have the burden of proving that a plaintiff prisoner suffered no prejudice, and therefore no violation of his Sixth Amendment rights, as a result of a pretrial custodial interrogation?

Table of Contents.

Introduction	1
Opinions below	2
Jurisdiction	2
Constitutional provision involved	3
Statement of the case	3
Reasons for granting the writ	9
Conclusion	15
Appendices	follows page 15

Table of Authorities Cited.

CASES.

Adickes v. Kress & Co., 398 U.S. 144 (1970)	11
Baker v. McCollan, 443 U.S. 137 (1979)	11
Briggs v. Goodwin, 698 F.2d 486 (D.C. Cir. 1983)	13
Carey v. Phipps, 435 U.S. 247 (1978)	11
Celotex Corp. v. Catrett, — U.S. —, 106 S.Ct. 2548 (1986)	14
Clarke v. Mann, 562 F.2d 1104 (8th Cir. 1977)	11
Clutchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985)	12
Commonwealth v. Cinelli, 389 Mass. 197, 449 N.E.2d 1207 (1983)	2
Estelle v. Gamble, 429 U.S. 97 (1976)	11
Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)	11
Gullate v. Potts, 654 F.2d 1007 (5th Cir. 1981)	11
Mastrain v. McManus, 554 F.2d 813 (8th Cir. 1977)	12
Peraza v. Delameter, 722 F.2d 1455 (9th Cir. 1984)	11
Smith v. Kent State University, 696 F.2d 476 (6th Cir. 1983)	11

Speiser v. Randall, 357 U.S. 513 (1958)	13
United States v. Costanzo, 740 F.2d 251 (3d Cir. 1984)	13
United States v. Davis, 646 F.2d 1298 (8th Cir. 1981)	12
United States v. Dien, 609 F.2d 1038 (2d Cir. 1979)	12
United States v. Ginsberg, 758 F.2d 823 (2d Cir. 1985)	12
United States v. Kelly, 790 F.2d 130 (D.C. Cir. 1986)	13
United States v. Irwin, 612 F.2d 1182 (8th Cir. 1980)	12
United States v. Levy, 577 F.2d 200 (3d Cir. 1978)	13
United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984)	7, 8, 13
United States v. Morrison, 449 U.S. 361 (1981)	10
United States v. Singer, 785 F.2d 228 (8th Cir. 1986)	11, 12
United States v. Steele, 727 F.2d 580 (6th Cir. 1983)	12
Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983)	11
Weatherford v. Bursey, 429 U.S. 545 (1977)	7, 9, 14

STATUTES.

28 U.S.C. § 1254(1)	3
42 U.S.C. § 1983	2, 7, 11

No. - .

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1987

MICHAEL CUTILLO AND ROBERT NUNEZ,
PETITIONERS,

v.

ARTHUR J. CINELLI,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit.**

Introduction.

Michael Cutillo ("Cutillo") and Robert Nunez ("Nunez")* hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit,

* Petitioners Michael Cutillo and Robert Nunez and Respondent Arthur J. Cinelli were the only parties in the court below. Judgment entered for the other parties, two municipalities, the City of Medford and the City of Revere, in the District Court and no appeal was taken from these judgments. See Appendix 2a, *Cinelli v. City of Revere*, 820 F.2d at 475.

entered on March 20, 1987, as supplemented on June 11, 1987. These decisions declared that Cutillo and Nunez, two police officers and defendants in a civil rights action brought under 42 U.S.C. § 1983, bore the burden of proving that they did not cause any prejudice to, and thereby violate the Sixth Amendment rights of, Arthur J. Cinelli ("Cinelli"), the plaintiff, during the course of a pretrial custodial interrogation conducted outside the presence of Cinelli's counsel.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, dated March 20, 1987 is reported at 820 F.2d 474 (1st Cir. 1987) (See Appendix ("A") 1a). The Court of Appeals' supplemental opinion, dated June 11, 1987, immediately follows its principal opinion. See 820 F.2d at 479-480 (A. 11a). Both decisions are reproduced in the appendix. The case was decided in the United States District Court for the District of Massachusetts without an opinion. A decision of the Massachusetts Supreme Judicial Court, from the prior criminal proceeding, is reported as *Commonwealth v. Cinelli*, 389 Mass. 197, 449 N.E.2d 1207 (1983) (A. 18a). The pertinent portion of this decision, Part 5, is reproduced in the appendix (A. 21a-25a). The decision of the motion judge from the Massachusetts Superior Court is also reproduced in the appendix (A. 26a).

Jurisdiction.

After the Court of Appeals issued its original decision, Petitioners Cutillo and Nunez timely filed a petition for rehear-

ing in banc to the Court of Appeals. The Court of Appeals treated this petition as both a panel petition for rehearing and a request for rehearing in banc (see A. 16a). The original panel that heard the appeal then issued a supplemental opinion on June 11, 1987. After the release of the supplemental opinion, the Court of Appeals denied the panel petition for rehearing and the request for rehearing in banc, effective as of October 22, 1987 (see A. 17a). This petition is being filed within ninety days of this date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision Involved.

The Sixth Amendment to the Constitution provides, in pertinent part, as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Statement of the Case.

Petitioners Cutillo and Nunez seek review of the decision of the United States Court of Appeals for the First Circuit that held that they bore the burden of proving that Cinelli was not prejudiced, and therefore not deprived of his Sixth Amendment rights, as a result of a post arraignment jailhouse interrogation. Although the Massachusetts State Courts, after an extensive evidentiary hearing and plenary appellate review, had ruled that Cinelli suffered no prejudice as a result of the interview, the Court of Appeals declined to give collateral estoppel effect to the prior findings. According to the Court of Appeals, it was "unclear" whether the State Courts had placed the burden of proof upon Cutillo and Nunez, and, therefore, the doctrine of collateral estoppel did not apply (A. 14a, 820 F.2d

at 480). Without the collateral estoppel effect of the State Court findings, according to the Court of Appeals, there was a genuine issue of material fact as to whether Cinelli suffered prejudice as a result of the interview (A. 9a-10a, 820 F.2d at 478-479). Accordingly, the Court of Appeals reversed the grant of summary judgment that had previously been entered in favor of Cutillo and Nunez.

The facts upon which Cutillo and Nunez grounded their motion for summary judgment may be summarized as follows: on May 2, 1981, armed gunmen robbed a branch bank in the City of Medford, a suburb of Boston, Massachusetts. During the course of the robbery, a Medford police officer was shot and seriously injured. After an intensive investigation, involving the efforts of several local police departments, the police arrested Cinelli on May 7, 1981. On the same day, Cinelli was arraigned on charges of armed robbery and attempted murder. At the arraignment, court-appointed counsel represented Cinelli. Later, Cinelli's family retained private counsel. However, Cinelli was unable to raise enough money to post bail, and he was held at the House of Correction in Billerica, Massachusetts, pending trial (A. 3a, 820 F.2d at 475).

Four days later, while on duty at Revere police headquarters, Detective Cutillo received an anonymous telephone call from a male caller who told him that Cinelli wished to talk with him at the Billerica jail. Cutillo, after speaking with the Medford Police Department to secure their permission, went to Billerica with his partner, Detective Nunez, to interview Cinelli. After Cinelli voluntarily signed a form waiving his right to counsel, Cinelli was escorted to a room to speak with Cutillo and Nunez (A. 3a, 820 F.2d at 475).

Throughout the interview, Cinelli steadfastly maintained his innocence, denying any involvement in the armed robbery. Cutillo told Cinelli that the case against him appeared to be

strong, that he could spend up to a year in jail awaiting trial, that he could receive a life sentence for the crimes that he was charged with, and that he would benefit by cooperating with the authorities. Cinelli reiterated to Cutillo and Nunez that he was innocent, and Cinelli told the detectives that he had friends on the street who were trying to find out who had committed the crimes. Cinelli then requested, and received permission from Cutillo and Nunez, to telephone two of his friends, a Rocco Costa and Thomas Lightbody. During the telephone conversation, Cinelli told Costa and Lightbody that they could speak with Cutillo if they wanted to. No further information was given and the interview ended with Cinelli reiterating his innocence. Cutillo and Nunez then left the institution, and notified the Medford police that they had learned nothing from their talk with Cinelli (A. 4a, 820 F.2d at 476; Affidavit of Cutillo in Support of Summary Judgment).

As a result of the interview, Cinelli filed a pre-trial motion with the Massachusetts Superior Court to dismiss all of the criminal indictments against him on the ground that his Sixth Amendment rights had been violated. After an extensive evidentiary hearing, a Superior Court judge issued a detailed decision in which he declined to dismiss the indictments against Cinelli (A. 26a-38a). In addition to making the findings set forth above, the judge concluded that, at the time of the interview, Cutillo and Nunez had reason to believe that Cinelli was represented by counsel. The judge further found that the purpose of the interview was to attempt to secure Cinelli's cooperation with the police investigation. Finally, the judge found that, at some point during the conversation, Cinelli asked about his lawyer and suggested that his lawyer should be present, although Cinelli never attempted to cut off his conversation with Cutillo and Nunez (A. 33a-34a). Cutillo and Nunez did not know the identity of Cinelli's attorney prior to the interview, and made no attempt to identify or locate counsel before or during the interview (A. 4a, 820 F.2d at 476).

Accordingly, the judge concluded that Cutillo and Nunez acted improperly during the interview. Notwithstanding these findings, the Superior Court judge declined to dismiss the indictments against Cinelli. This decision was based upon three basic factors. First, the judge found that Cinelli had suffered no prejudice as a result of the interview. Cinelli made no incriminating statements during the course of the interview, professed his innocence at all times, and retained full confidence in his trial counsel. Second, the judge found that Cutillo and Nunez did not intentionally attempt to subvert the attorney-client relationship. Rather, the interview was initiated as a result of the anonymous telephone call, and Cutillo and Nunez made no disparaging remarks about Cinelli's attorney. Finally, the judge found that Cinelli had voluntarily executed the written waiver of his right to counsel, and that this waiver had the effect of putting Cinelli on notice as to his constitutional rights. In short, the judge concluded, "that the Commonwealth has made an affirmative showing that the detectives' error here was harmless and that the defendant Cinelli was not prejudiced." (A. 35a-38a.)

After the denial of the motion to dismiss, the Cinelli was tried and convicted on the criminal charges in Superior Court. After Cinelli was sentenced to serve twenty to twenty-five years in prison, he filed an appeal of his conviction to the Massachusetts Supreme Judicial Court.

In his appeal, Cinelli claimed, *inter alia*, that the interview warranted a dismissal of the indictments, without regard to the issue of prejudice. In the alternative, he argued that the Superior Court judge's finding that he was not prejudiced was erroneous. After hearing, the Supreme Judicial Court rejected both assertions. Noting that the intrusion was not deliberate, and that the remarks of Cutillo and Nunez were, for the most part, accurate, the Supreme Judicial Court rejected Cinelli's request to adopt a per se rule of dismissal in the absence of

proof of prejudice. As for the Superior Court's finding of no prejudice, the Supreme Judicial Court ruled that this finding was correct, as Cinelli made no incriminating statements, his defense was in no way impaired, and the prosecution learned nothing as a result of the interview. Accordingly, the Supreme Judicial Court affirmed Cinelli's conviction, and Cinelli was committed to serve his sentence in prison (A. 24a-25a, 389 Mass. 210-212).

While serving his sentence, Cinelli commenced this action in the United States District Court for the District of Massachusetts under 42 U.S.C. § 1983. Cinelli's complaint sought, *inter alia*, damages allegedly arising from the denial of his Sixth Amendment right to counsel. After preliminary proceedings, Cutillo and Nunez filed a motion for summary judgment, relying on the State Court findings as preclusive, thereby preventing proof of prejudice, an essential element of any Sixth Amendment violation. After review of the record, the District Court judge agreed with Cutillo and Nunez, ruled that Cinelli could not prove prejudice, and entered an order dismissing the action.

On appeal, the Court of Appeals for the First Circuit reversed the Order of the District Court. According to the Court of Appeals, there was a genuine issue of material fact as to whether Cinelli suffered any prejudice as a result of the jailhouse interrogation. The First Circuit, citing *Weatherford v. Bursey*, 429 U.S. 545 (1977), started its analysis by recognizing that proof of prejudice was a necessary element of a Sixth Amendment violation. See A. 5a-6a, 820 F.2d at 476-477. However, applying its decision in *United States v. Mastroianni*, 749 F.2d 900, 907-908 (1st Cir. 1984), the Court held that the conveyance of private communications to the prosecution or its agents constituted a prima facie showing of prejudice. Upon such proof, according to the Court, "the burden shifts to the government to show that there has been and

will be no prejudice to the defendants as a result of these communications." (A. 8a, 820 F.2d at 478, quoting *Mastroianni*, *supra* at 907-908.)

Applying this standard, the Court ruled that Cinelli had established that confidential information, his intention to present an alibi defense, had been conveyed, and therefore the burden of proof shifted to Cutillo and Nunez. Based upon the record relied upon in the District Court, the Court of Appeals ruled that it could not conclude that Cutillo and Nunez had foreclosed all possibility that Cinelli had suffered prejudice during the course of the interview (A. 9a-10a, 820 F.2d at 478-479).

As a result of the Court of Appeals' initial decision, Cutillo and Nunez moved for rehearing. The thrust of the petition for rehearing was that the Court of Appeals had overlooked the fact that Cinelli was precluded from attempting to relitigate the issue of prejudice as a result of the doctrine of collateral estoppel. In a supplemental opinion, the Court of Appeals rejected this argument. Concluding that it was uncertain as to whether the State Courts placed the burden of proof on Cutillo and Nunez, the First Circuit reiterated its holding that Cutillo and Nunez bore the burden of proving that Cinelli suffered no prejudice as a result of the interview, and, therefore, the doctrine of collateral estoppel did not preclude proof of prejudice (A. 14a, 820 F.2d at 480).

The Court of Appeals decisions squarely placed upon Cutillo and Nunez the burden of proof that Cinelli suffered no prejudice. Since prejudice is an essential element of the Sixth Amendment claim, the Court of Appeals decisions, in effect, placed the burden on Cutillo and Nunez to prove that they did not violate Cinelli's Sixth Amendment rights. Whether civil rights defendants, such as Cutillo and Nunez, must bear such a burden of proof is the issue raised in the opinions of the Court of Appeals, and is the issue presented to this Court by this petition.

Reasons for Granting the Writ.

The decision of the Court of Appeals stands alone in its unique allocation of the burden of proof in a Sixth Amendment case. The Court's rule, placing the burden on the government to prove a lack of prejudice after the conveyance of confidential information has been shown, has no support in any of the decisions of this Court and it directly conflicts with decisions of other Circuits in Sixth Amendment litigation. If permitted to stand, the decision of the First Circuit could result in errors in numerous civil and criminal cases as a result of its inappropriate allocation of the burden of proof. It will also inevitably distort the substantive definition of what conduct constitutes a violation of the Sixth Amendment. Accordingly, this Court should grant certiorari to resolve the conflict among the Circuits and correctly set forth the rule as to the burden of proof of prejudice in Sixth Amendment cases.

The prior Sixth Amendment decisions of this Court cannot be used to justify the First Circuit rule. If anything, these cases suggest that the burden of proof, in civil matters, appropriately rests upon the plaintiff throughout the case. For example, in the leading case, *Weatherford v. Bursey*, 429 U.S. 545 (1977), this Court characterized the result as depending upon plaintiff's failure of proof.

There being no tainted evidence in this case, no communications of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment insofar as it is applicable to the States by virtue of the Fourteenth Amendment. The proof in this case thus fell short of making out a Section 1983 claim. . . .

Id. at 558.

A sensible reading of *Weatherford* would therefore suggest that if the proof "fell short" of establishing a constitutional violation, then it was necessarily the plaintiff who failed to adduce sufficient proof.

Similarly, earlier in the opinion, this Court listed missing evidentiary facts that could have strengthened the plaintiff's case:

[h]ad Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overhead conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554. This recitation strongly suggests that it was not the defendant Weatherford's obligation to establish that plaintiff Bursey had suffered no prejudice, but that it was Bursey's obligation, like any other civil rights plaintiff, to prove that his Sixth Amendment rights had been violated.

Neither can this Court's decision in *United States v. Morrison*, 449 U.S. 361 (1981) provide any justification for the First Circuit rule. *Morrison* did not even address the question as to whether a Sixth Amendment violation was committed as a result of the police interrogation that took place. Rather, the Court *assumed*, merely for purposes of the decision, that a Sixth Amendment violation took place. See *Morrison*, *supra* at 364. Such an assumption is a routine practice to avoid unnecessary constitutional adjudication, and cannot be confused with a decision on the merits.

A review of the allocation of the burden of proof in other civil rights cases in this Court provides no support for the First Circuit rule. This Court established the principle long ago in litigation under 42 U.S.C. § 1983 that the civil rights plaintiff bears the burden of proving both elements of the cause of action: a deprivation of a federal constitutional or statutory right, committed by the defendant under color of state law. See e.g., *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). This burden of proof has remained the same regardless of the particular constitutional provision at stake. Whether it be the Fourth, Eighth, or Fourteenth Amendments at issue, the plaintiff must show that plaintiff's constitutional rights have been violated. See e.g., *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Carey v. Piphus*, 435 U.S. 247, 262-264 (1978); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-156 (1978).

This basic tenet has found uniform acceptance in the lower courts. Most circuits have recognized and applied the rule that the burden of proof in civil rights actions rests with the plaintiff. See e.g., *Gullate v. Potts*, 654 F.2d 1007, 1014-1015 (5th Cir. 1981); *Smith v. Kent State University*, 696 F.2d 476, 479 (6th Cir. 1983); *Vicory v. Walton*, 721 F.2d 1062, 1063 (6th Cir. 1983); *Clarke v. Mann*, 562 F.2d 1104, 1117 (8th Cir. 1977); *Peraza v. Delameter*, 722 F.2d 1455, 1457 (9th Cir. 1984).

Similarly, in criminal cases, when a defendant has raised a Sixth Amendment claim as a basis for dismissing the indictments against him, the majority of the circuits have disagreed with the First Circuit's allocation of the burden of proof. Rather, the majority of the circuits have adopted the rule in criminal cases that it is the obligation of the criminal defendant to prove both the intrusion upon the attorney-client relationship and the resulting prejudice in order to establish a Sixth Amendment violation. For example, the Eighth Circuit, in *United*

States v. Singer, 785 F.2d 228, 234 (8th Cir. 1986), sets forth the general rule as follows:

To establish a sixth amendment violation, a criminal defendant must show two things: first, that the government knowingly intruded into the attorney-client relationship; and second, that the intrusion demonstrably prejudiced the defendant . . . (Citations omitted).

Accord, *United States v. Davis*, 646 F.2d 1298, 1303 (8th Cir.), cert. denied, 454 U.S. 868 (1981); *Mastrain v. McManus*, 554 F.2d 813, 821 (8th Cir.), cert. denied, 433 U.S. 913 (1977).

The Second, Sixth, and Ninth Circuits also follow this general rule and place the burden of proof on the criminal defendant to prove prejudice. See *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985) ("We therefore hold that, to require a hearing on a claimed sixth amendment violation . . . a defendant must allege specific facts that indicate communication of privileged information to the prosecutor and prejudice resulting therefrom"); Accord, *United States v. Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979); *United States v. Steele*, 727 F.2d 580, 586-587 (6th Cir. 1983), cert. denied, 467 U.S. 1209 (1984) ("The appellants have failed to show any violation of the principles set forth in *Weatherford*, and failed to show any prejudice from the alleged invasion of the defense camp by Trammel. We therefore find no basis for their assertion that they were denied effective assistance of counsel, due process or a fair trial"); *Clutchette v. Rushen*, 770 F.2d 1469, 1471-1473 (9th Cir. 1985) ("Clutchette, therefore, has failed to establish a deprivation of rights protected by the Sixth Amendment"); Accord, *United States v. Irwin*, 612 F.2d 1182, 1186 (8th Cir. 1980).

The circuits are not unanimous on this issue, as the First Circuit noted in its decision in *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984). Indeed, the Third Circuit has ruled that there is no need to shift the burden of proof to the government. Instead, a Sixth Amendment violation is established, according to the Third Circuit, upon a showing that confidential communications have been conveyed from the defense camp to the government. See *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984). See also *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) ("We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society"). The District Court of Columbia Circuit has sent differing signals as to which rule it would apply. On the one hand, in *Briggs v. Goodwin*, 698 F.2d 486 (D.C. 1983), the Court implied that it would follow the Third Circuit rule, that once information is communicated, the Sixth Amendment violation is complete. However, in *United States v. Kelly*, 790 F.2d 130 137 (D.C. Cir. 1986), the Court noted the conflict among the circuits and stated that the issue was open. In *Kelly*, the Court declined to answer it in the absence of a concrete factual setting. In short, there is a clear division among the circuits as to the quantum and burden of proof required to establish a constitutional violation.

Aside from resolving this conflict among the circuits, there are other important reasons why this Court should grant the writ. This Court has long recognized that the issue as to the correct allocation of the burden of proof can determine who will win and who will lose in all kinds of litigation. *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Moreover, short of

trial, the incorrect allocation of the burden of proof established by the First Circuit will prevent, as it did in this case, the entry of appropriate summary judgments. See *Celotex Corp. v. Catrett*, — U.S. —, 106 S.Ct. 2548, 2553 (1986). The First Circuit rule can only have the effect of prolonging unnecessary and unwarranted litigation.

Finally, and perhaps most importantly, the First Circuit rule necessarily blurs the contours of the Sixth Amendment right to assistance of counsel. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), this Court was urged to adopt a per se rule that any intrusion into the attorney-client relationship constituted a violation of the Sixth Amendment. Instead, this Court declined the invitation and ruled that the Sixth Amendment was violated only when there is prejudice — injury to the defendant or benefit to the state. See *Weatherford*, *supra* at 558. The First Circuit ruling in this case, by permitting the potential for recovery without proof of injury to the defendant or benefit to the state, inevitably must undermine the *Weatherford* definition of a Sixth Amendment violation. For in those cases where government cannot sustain its burden of proving the absence of prejudice, there is no difference between the First Circuit approach and a per se rule. This back-door route to the reintroduction of a per se rule ought not to be permitted. This Court should therefore grant certiorari to establish that the reallocation of the burden of proof is not a permissible method of redefining the substantive rights guaranteed by the Sixth Amendment.

Conclusion.

For all of the foregoing reasons, petitioners Michael Cutillo and Robert Nunez respectfully request this Honorable Court to grant their petition for certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400

**Counsel of Record*

Table of Contents.

Appendix A — Opinion of the United States Court of Appeals for the First Circuit dated March 20, 1987	1a
Appendix B — Supplemental Opinion of the United States Court of Appeals for the First Circuit dated June 11, 1987	11a
Appendix C — Order of the Court dated June 22, 1987	15a
Appendix D — Order of the Court dated October 22, 1987	16a
Appendix E — Commonwealth v. Cinelli, 389 Mass. 197 (1983) (Part 5 only)	18a
Appendix F — Memorandum of Decision of Massachusetts Superior Court	26a

1a

Appendix A

**United States Court of Appeals
For the First Circuit**

No. 86-1794

ARTHUR J. CINELLI,
PLAINTIFF, APPELLANT,

v.

CITY OF REVERE, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before

Bownes, *Circuit Judge*,
Aldrich, *Senior Circuit Judge*,
and Gignoux,* *Senior District Judge*.

*Edward J. McCormack, III [sic] with whom Law Office of
Edward J. McCormack, III [sic] was on brief for appellant.*

*Ira H. Zaleznik with whom Lewin & Rosenthal was on brief
for appellees.*

March 20, 1987

*Of the District of Maine, sitting by designation.

GIGNOUX, *Senior District Judge*. Plaintiff-appellant Arthur J. Cinelli was indicted by a Middlesex County, Massachusetts, grand jury for various offenses stemming from an armed robbery and the shooting of a Medford police officer. Prior to trial, Cinelli filed a motion to dismiss the indictment on the ground that his sixth amendment right to counsel was violated by a custodial interrogation conducted by Detectives Michael Cutillo and Robert Nunez of the Revere Police Department. After an evidentiary hearing, a motion judge of the Superior Court denied the motion. Cinelli was subsequently convicted following a jury trial, and sentenced to twenty to twenty-five years imprisonment. The conviction was affirmed on appeal. *Commonwealth v. Cinelli*, 389 Mass. 197, 449 N.E.2d 1207 (1983). Cinelli then filed an action under 42 U.S.C. § 1983 (1982) in the United States District Court for the District of Massachusetts against Detectives Cutillo and Nunez and against the cities of Revere and Medford, seeking damages for the alleged violation of his sixth amendment right to counsel. The defendants filed a motion for summary judgment. At the hearing on that motion, Cinelli consented to dismissal of the complaint against the municipalities. The district court, citing *United States v. Mastroianni*, 749 F.2d 900 (1st Cir. 1984), concluded that Cinelli could not establish any violation of his sixth amendment rights and granted summary judgment in favor of Cutillo and Nunez.¹ Cinelli appeals from the order dismissing the action against Cutillo and Nunez. Because our review of the record before the district court shows a genuine issue as to a material fact, the resolution of which requires a trial, Fed. R. Civ. P. 56(c), we reverse the grant of summary judgment.

¹ The district court's grant of summary judgment was by endorsement on the motion, without written findings or opinion.

I.

The Massachusetts motion judge, after consideration of the testimony at the hearing on Cinelli's motion to dismiss the indictment, made detailed written findings of fact and rulings of law, which may be summarized as follows. On May 7, 1981, Cinelli was arrested on charges of armed robbery and assault with intent to murder. On the same day, he was arraigned in the Somerville District Court, where he was represented by court-appointed counsel. On May 8, he appeared at a bail review hearing in the Middlesex Superior Court, represented by retained counsel, who has remained his counsel since that time. Unable to post bail, Cinelli was incarcerated at the Billerica House of Corrections in an isolation section of the facility. Four days later, at approximately 7:15 p.m. on May 12, Detective Cutillo received an anonymous telephone call from a male who indicated that Cinelli wished to speak with him at Billerica. After receiving the anonymous call, Cutillo and Detective Nunez went to Billerica to speak with Cinelli, arriving between 8:30 and 9:00 p.m. The desk officer presented the two police officers with a waiver sheet on which they printed their names. As Cinelli was being taken from his cell and before he arrived at the reception area where Cutillo and Nunez were waiting, Cinelli was presented with the waiver sheet. He was told that two Revere police officers were there to see him, that he did not have to talk with them, and that he was entitled to have his lawyer present if he wished to speak with them. The defendant looked at the waiver sheet for approximately twenty to thirty seconds and appeared to be reading it. He then signed the waiver indicating that he would voluntarily talk to the detectives. At that point he was escorted to the reception area where he met with Cutillo and Nunez.

Throughout the conversation that followed, Cinelli maintained his innocence, steadfastly denying any involvement in

the armed robbery and indicating that he had alibi. The detectives told Cinelli that the case against him appeared to be strong, that no lawyer would be able to help him, that he would spend up to a year in jail awaiting trial, that he could receive a life sentence if convicted, and that he would benefit by cooperating with the police in identifying other participants in the crime. The detectives also informed Cinelli that if he did not commit the armed robbery, they did not wish to see him convicted, and that if he was not guilty, he should give the detectives any information that could be helpful in establishing his innocence. Cinelli replied that he had friends on the street who were trying to find out who committed the robbery, and identified two of them named Costa and Lightbody. At Cinelli's request, the detectives permitted Cinelli, in their presence, to telephone Costa and Lightbody. He advised them that they could speak to Cutillo if they wished.

At the time of the May 12 conversation, Cutillo and Nunez had reason to believe Cinelli was represented by counsel and knew that he had the right to have counsel present during the interview. The detectives' purpose in visiting Cinelli was to see if he would cooperate with the police investigation, although they went to Billerica believing Cinelli had asked to see them. At some point during the conversation, Cinelli asked where his lawyer was and suggested that his lawyer should be present. The detectives did not know the identity of Cinelli's counsel, and did not attempt to identify or locate Cinelli's attorney before or during the interview.

Based on the foregoing findings of fact, the Massachusetts motion judge concluded: (1) that Cinelli's waiver of counsel prior to talking with the detectives made "voluntarily, knowingly and intelligently," and hence was effective; and (2) that the conduct of the officers, although reprehensible, did not warrant dismissal of the indictment because Cinelli did not make any incriminating statements during the interview and

had shown "no specific evidence of prejudice."² In affirming Cinelli's conviction, the Supreme Judicial Court accepted the motion judge's finding that Cinelli was not prejudiced by the detectives' improper conduct and held that there was no error in the denial of the motion to dismiss. 389 Mass. at 207-11.

II.

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Cutillo and Nunez acknowledge that at the time they interviewed Cinelli, who had been previously charged and arraigned, his right to counsel had attached. *See United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Brewer v. Williams*, 480 U.S. 387, 398 (1977); *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972). They also concede that Cinelli's written waiver of his right to the presence of counsel at the interview was invalid. *See Michigan v. Jackson*, 106 S. Ct. 1404, 1411 (1986); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1985). And they admit that, despite the written waiver, they unquestionably should have terminated the interview when Cinelli suggested that his lawyer should be present. *See Maine v. Moulton*, 106 S.Ct. 477, 484-85 (1985). They contend, however, that proof of prejudice is required to establish a violation of the sixth amendment right to counsel and argue that the facts show Cinelli suffered no prejudice as a result of the interview. Accordingly, they say, the district court was correct in entering summary judgment against Cinelli. We agree that a showing of prejudice must be made to establish a sixth amendment violation, but we also conclude that on the record before the district court there was a genuine issue of material fact as to whether Cinelli suffered prejudice as a result of the interview.

² Although declining to dismiss the indictment, the motion judge stated that "[i]f the remedy sought by the defendant arose in the context of a motion to suppress incriminating statements of the defendant in his conversation with the detectives, the court would have no trouble in siding with the defendant."

Decisions of the Supreme Court and of this Court instruct that a sixth amendment violation cannot be established without a showing that there is "a realistic possibility of injury" to the defendant or "benefit to the State." *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977); *United States v. Morrison*, 449 U.S. 361, 366 (1981); *United States v. Mastroianni*, 749 F.2d at 907. In *Weatherford*, Weatherford, an undercover agent, met twice with defendant Bursey and his counsel, Wise, to discuss defense strategy. Weatherford communicated nothing about the meetings to the prosecution. The court of appeals adopted the rule that an agent's participation in a defense meeting amounted to a *per se* violation of the defendant's sixth amendment right. The Supreme Court rejected that rule and held that "[t]here being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment. . . ." 429 U.S. at 558. Significantly, however, the Court added that

[h]ad Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overhead conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have had a much stronger case.

Id. at 554 (footnote omitted).

The facts in *Morrison* more closely resemble those in this case. In *Morrison*, federal agents, aware that defendant Morrison had been indicted on drug charges and had retained counsel, twice met with her without her attorney's knowledge or permission. The agents' purpose was to seek her cooperation

in a related investigation. They disparaged Morrison's counsel and indicated that she would gain various benefits if she cooperated and would face a stiff jail term if she did not. Morrison refused to cooperate, did not incriminate herself or supply any information relevant to her case, and continued to rely upon the services of her attorney. The court of appeals held that, whether or not the defendant had been prejudiced, her sixth amendment right to counsel had been violated and dismissed the indictment with prejudice. The Supreme Court, in a unanimous opinion, reversed. The Court assumed, without deciding, a sixth amendment violation. 449 U.S. at 364. It held that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *Id.* at 365 (footnote omitted). Although the Court concluded that the sixth amendment violation, if any, did not justify dismissing the criminal proceeding against Morrison, the Court was careful to observe that it was not "condon[ing] the egregious behavior of the Government agents," nor was it suggesting that in similar cases "a Sixth Amendment violation may not be remedied in other proceedings." *Id.* at 367.

Mastroianni presented a fact pattern similar to that in *Weatherford*. *Mastroianni* was a consolidated appeal to this court by four defendants from their convictions for conspiracy to distribute cocaine. One of the issues defendants raised was whether their sixth amendment right to counsel was violated by the government's authorizing Cellilli, a defendant who was cooperating with the federal government, to attend a joint meeting of defendants and their counsel. After a twelve-day hearing, the district court denied defendants' pretrial motion to dismiss the indictment. In affirming, we accepted the district court's finding that the evidence presented by the government "fairly demonstrated that it did not use any information impermissibly obtained from Cellilli"; we held that "[b]ecause no prejudice resulted to the defendant, there was no Sixth Amendment violation." 749 F.2d at 908.

These three cases answer some, but not all, of the possible questions in this case. At one end, an indictment is not to be dismissed when the sixth amendment violation does not benefit the prosecution or prejudice the defense of the criminal action. At the other end, if there was no prejudice to the criminal trial, and the defendant, plaintiff in the section 1983 action, suffered no emotional injury because of the officers' improper behavior, there can be no section 1983 recovery. We leave open the question of whether severe emotional injury, such as may have resulted in this case from the egregious misconduct of the officers, is something that may be remedied in a section 1983 action. See *Morrison*, 449 U.S. at 367. We need not answer this question, as we believe that the record before the district court did not foreclose a finding under *Mastroianni* that the interview resulted in a benefit to the Commonwealth or a detriment to the defendant at the criminal trial.

In *Mastroianni*, we noted that the Supreme Court had not had occasion to determine what showing of prejudice to the defense of a criminal action is required to establish a sixth amendment violation and who bears the burden of proving it. Balancing the competing concerns, we concluded that

in order to make a prima facie showing of prejudice the defendant must prove that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting. Upon such proof, the burden shifts to the government to show that there has been and there will be no prejudice to the defendants as a result of these communications.

759 [sic] F.2d at 907-08 (citations and footnote omitted).

With this legal standard in mind, we turn to the question of whether the record in this case supports a finding that Cinelli's

defense of the criminal action was not prejudiced by the interview. The Massachusetts Superior Court motion judge found that during the interrogation Cinelli conveyed to the detectives his intention to present an alibi defense and the names of two potential alibi witnesses, Costa and Lightbody. By establishing that the defense strategy was communicated to the detectives, Cinelli made a prima facie showing of prejudice. The burden then shifted to Cutillo and Nunez to show that these communications resulted in no prejudice to Cinelli.

It is at this point that we have difficulty with the district court's grant of summary judgment. The limited record before the district court¹ did not include the transcript of Cinelli's trial, and neither the district court nor we have any way of determining whether the Commonwealth benefited from the disclosures made by Cinelli to the detectives. Nor is it possible to ascertain from the record whether the Commonwealth had identified Costa and Lightbody as potential alibi witnesses prior to the interview. Although the Massachusetts Supreme Judicial Court in affirming Cinelli's conviction observed that the Commonwealth had identified Costa as a possible suspect prior to the interview, see 389 Mass. at 211, the record upon which that court relied was not before the district court in this case. Moreover, even accepting this statement as fact, it is still unclear whether the police learned for the first time during the interview that Cinelli intended to rely on an alibi defense or that Costa's involvement was as a potential alibi witness.

¹ The materials submitted by the defendants in support of their motion for summary judgment consisted of: an affidavit of Cutillo setting forth his version of the interview with Cinelli; an affidavit of the Acting Chief of the Revere Police Department incorporating a portion of the Revere Police Manual; a transcript of the hearing before the Massachusetts motion judge on Cinelli's motion to dismiss the indictment; a copy of the motion judge's memorandum of decision on the motion to dismiss; a copy of the waiver form signed by Cinelli; and a copy of the opinion of the Massachusetts Supreme Judicial Court.

10a

In any event, we find nothing in the record to suggest that the Commonwealth already had Lightbody's name.

On the record before the district court there was a genuine issue of material fact as to whether Cinelli's defense of the criminal action was prejudiced by the communication of his defense strategy to Cutillo and Nunez. We leave to another day whether the evidence may warrant a finding of a recovery here even if there was no prejudice to the criminal trial.

The district court's grant of summary judgment is *Reversed*.⁴

⁴Because the district court did not reach Cutillo's and Nunez's claim of qualified immunity, we decline to consider that defense.

11a

Appendix B

**United States Court of Appeals
For the First Circuit**

No. 86-1794

ARTHUR J. CINELLI,
PLAINTIFF, APPELLANT,

v.

CITY OF REVERE, ET AL.,
DEFENDANTS, APPELLEES.

Before

Bownes, *Circuit Judge*,
Aldrich, *Senior Circuit Judge*,
and Gignoux,* *Senior District Judge*.

SUPPLEMENTAL OPINION

June 11, 1987

Defendant-appellees Cutillo and Nunez have filed a petition for rehearing of the above appeal in banc. Reading it brings to our attention that our opinion, 814 F.2d 17, failed to deal with the issue of collateral estoppel, now stressed by appellees. We accordingly supplement that opinion, and address appellees' arguments.

In our decision, we reversed the district court's grant of summary judgment in favor of Cutillo and Nunez; we held

* Of the District of Maine, sitting by designation.

that "[o]n the record before the district court there was a genuine issue of material fact as to whether Cinelli's defense of the criminal action was prejudiced by the communication of his defense strategy to Cutillo and Nunez." 814 F.2d at 22. We also declined to consider Cutillo's and Nunez's claim of qualified immunity, because the district court had not reached that issue. *Id.* at 22, n.4.

Appellees' principal contention is that our finding of a genuine issue of material fact as to whether Cinelli was prejudiced failed to accord to the prior decisions of the Massachusetts state courts the preclusive effect required by the doctrine of collateral estoppel.¹ We reject this argument.

It is well established that the doctrine of collateral estoppel, or issue preclusion, applies in civil rights actions brought pursuant to 42 U.S.C. § 1983 (1982). *Allen v. McCurry*, 449 U.S. 90 (1980). A federal court must give the same preclusive effect to issues already decided as would be given by the courts of the state in which the federal court sits. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

Massachusetts courts apply the general rule of issue preclusion as set forth in the Restatement (Second) of Judgments (1982). *Aetna Casualty & Sur. Co. v. Niziolek*, 395 Mass. 737, 481 N.E.2d 1356 (1985); *Massachusetts Property Ins. Underwriting Ass'n v. Norrington*, 395 Mass. 751, 481 N.E.2d 1364 (1985). See *Isaac v. Schwartz*, 706 F.2d 15, 16 (1st Cir. 1983). Section 27 of the Restatement provides that "[w]hen an issue of fact or law is actually litigated and determined by valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent

¹ Appellees also assert that our refusal to consider the qualified immunity defense was an improper exercise of judicial discretion. We are well aware that an appellate court *may* affirm a grant of summary judgment on different grounds than those cited by the court below. See generally 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2716, at 658 (1983). Such action, however, is discretionary, not mandatory. *Id.* We remain of the view that the qualified immunity issue should first be determined by the district court on a full record after remand.

action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982). Massachusetts courts have abandoned the requirement of mutuality and apply the doctrine of collateral estoppel in subsequent litigation with other parties. *Aetna Casualty & Sur. Co.*, *supra*, 481 N.E.2d at 1359; *Massachusetts Property Ins. Underwriting Ass'n*, *supra*, 481 N.E.2d at 1366. See Restatement (Second) of Judgments § 29 (1982).

The general rule of collateral estoppel is not without exceptions. One exception exists when

[t]he party against who preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action

Id., § 28(4). See also C. Wright, *Law of Federal Courts* 683-84 (4th ed. 1983) (collateral estoppel inapplicable if there is a significant difference in the burden of persuasion on the issue in the two actions) (footnotes omitted).

In *United States v. Mastroianni*, 749 F.2d 900 (1st Cir. 1984), we formulated for the first time the burden of proof as to prejudice in a sixth amendment case. There, we stated that a defendant makes a *prima facie* case of prejudice by proving that the prosecution received confidential communications about the defense's strategy or position; upon such proof, the burden shifts to the prosecution to prove that there has been and will be no prejudice to the defendant as a result of the communications. *Id.* at 907-08.

Cinelli originally asserted prejudice in state court in the context of a motion to dismiss the indictment against him. The Massachusetts motion judge found that Cinelli had not been prejudiced and denied the motion. *Commonwealth v. Cinelli*, Crim. No. 81-1489 to 81-1492, slip op. (Middlesex County

Super. Ct., Sept. 11, 1981). That decision, however, is unclear as to the burden of proof applied by the judge. At one point he concluded that "the Commonwealth has made an affirmative showing that the detectives' error here was harmless and that the defendant Cinelli was not prejudiced." *Id.* at 16. Elsewhere in his decision, however, he found "no specific evidence of prejudice has been shown *by the defendant.*" *Id.* at 13 (emphasis added). The motion judge's statement that there was no showing of prejudice by the defendant suggests that he did not properly apply the *Mastroianni* standard. Uncertainty as to whether the correct burden of proof was applied is compounded by the decision of the Supreme Judicial Court affirming the lower court's decision. The Supreme Judicial Court noted that "[i]n this case there is no showing of any prejudice whatsoever." *Commonwealth v. Cinelli*, 389 Mass. 197, 210 (1983). Again, the language suggests that it was Cinelli's burden to prove prejudice — a burden that is improper under *Mastroianni*.

Because it is unclear whether the state courts imposed the proper burden of proof, we conclude that the doctrine of collateral estoppel does not preclude Cinelli from litigating the question of prejudice in this action.

Appendix C

United States Court of Appeals For the First Circuit

No. 86-1794

ARTHUR J. CINELLI,
PLAINTIFF, APPELLANT,

v.

CITY OF REVERE, ET AL.,
DEFENDANTS, APPELLEES.

Before

Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella and Selya *Circuit Judges*.

ORDER OF COURT

Entered: June 22, 1987

The petition for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be denied.

By the Court:

/s/Francis P. Scigliano

Clerk.

16a

Appendix D

**United States Court of Appeals
For the First Circuit**

No. 86-1794

ARTHUR J. CINELLI,
PLAINTIFF, APPELLANT,

v.

CITY OF REVERE, ET AL.,
DEFENDANTS, APPELLEES.

Before

Bownes, *Circuit Judge*,
Aldrich, *Senior Circuit Judge*,
and Gignoux, * *Senior District Judge*.

ORDER OF COURT

Entered: October 22, 1987

Upon consideration of the motion of appellees Michael Cutillo and Robert Nunez "for an order on appellees' Petition For Rehearing In Banc",

It is ordered as follows:

1. That this Court will consider appellees' Petition for Rehearing In Banc as both a panel petition for rehearing and a request for rehearing in banc.

* Of the District of Maine, sitting by designation.

17a

2. That, as set forth above, appellees' Petition For Rehearing and Petition for Rehearing In Banc is denied as of the date of this Order or as of June 22, 1987.

By the Court:

/s/Francis P. Scigliano

Clerk.

COMMONWEALTH vs. ARTHUR J. CINELLI
(and seven companion cases¹).

Middlesex. December 9, 1982. — May 16, 1983.

Present: HENNESSEY, C.J., LIACOS, ABRAMS, NOLAN, & LYNCH, JJ.

Robbery. Practice, Criminal, New trial, Dismissal, Discovery. Identification. Constitutional Law, Assistance of counsel, Conduct of government agents, Search and seizure, Waiver of constitutional rights. Waiver. Probable Cause.

Evidence at the trial of indictments charging armed robbery and other serious crimes was sufficient to warrant submission of the cases to the jury despite a defendant's claim that the Commonwealth had failed to produce a witness who would definitely identify him as the driver of the assailants' vehicle. [203-204]

A judge did not abuse his discretion in denying a criminal defendant's motion for a new trial, based on the contention that verdicts of guilty of armed robbery and other serious crimes were against the weight of the evidence, where certain alibi testimony which the defendant claimed the jury had "irrationally" disregarded contained inconsistencies and was unpersuasive. [204-205]

A judge's order compelling a criminal defendant to shave his beard and to appear in a pretrial court-supervised lineup was not such a suggestive procedure as to violate the due process clause of the Fourteenth Amendment to the United States Constitution where evidence before the judge entitled him to conclude that the defendant, if bearded, had only a slight beard at the time of the crime. [205-207]

Although police officers acted improperly in conducting a post-arraignment interview of a defendant at a house of correction when they had reason to know he was represented by counsel and after he suggested that counsel should be present, their conduct did not require dismissal of indictments against the defendant where the circumstances did not show that the police had acted with deliberateness and calculation to subvert the attorney-client relationship or that the interview had resulted in prejudice to the defendant. [207-211]

¹There were three indictments against Cinelli and four indictments against codefendant Rocco Costa.

Evidence at a hearing on a motion to suppress statements made by a criminal defendant warranted findings that he had been properly advised of his Miranda rights and possessed sufficient mental capacity to waive them. [212]

Where an affidavit in support of a search warrant for certain premises recited facts establishing probable cause to believe that a named person who resided on the premises had committed a robbery and that certain ammunition was connected with the crime, a police search of the premises pursuant to the warrant and their seizure of ammunition found there was lawful. [212-214]

There was no merit to the contention of criminal defendants that the Commonwealth's failure to provide them with an "anonymous tips" file, compiled by a police department, denied them due process of law, where the information contained in the file could not have aided them significantly. [214-215]

INDICTMENTS found and returned in the Superior Court Department on May 19, 1981.

A pretrial motion to compel the defendant Costa to participate in a lineup was heard by *Kelley, J.*, and a motion by the defendant Cinelli to dismiss the indictments was heard by *Connolly, J.* The cases were tried before *Urbano, J.*

The Supreme Judicial Court granted a request for direct appellate review.

Edward J. McCormick, III, for Arthur J. Cinelli.

James S. Gallagher for Rocco Costa.

Carmel A. J. Motherway, Assistant District Attorney, for the Commonwealth.

Thomas G. Shapiro, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

LIACOS, J. The defendants were convicted by a jury on October 21, 1981, of armed robbery, armed assault with intent to murder, unlawful carrying of a firearm,² and assault and battery with a dangerous weapon. The convictions arise out of the armed robbery and shooting of Sergeant Richard McGlynn, a Medford police officer, on May 2, 1981, outside the offices of BayBank/Middlesex on Mystic Avenue in Medford. The defendant Cinelli received a sentence of from twenty to twenty-five years at the Massachu-

²Costa was convicted of unlawfully carrying a firearm in a motor vehicle.

setts Correctional Institution at Walpole for armed robbery and concurrent sentences on the remaining indictments. The defendant Costa received a sentence of from eight to twelve years for armed robbery and concurrent sentences on the remaining indictments. The defendants appealed, and we granted Cinelli's application for direct appellate review.

Costa claims error in that (1) the trial judge denied his motions for required findings of not guilty and for relief under Mass. R. Crim. P. 25 (b) (2), 378 Mass. 896 (1979), and that (2) a motion judge of the Superior Court ordered him to shave his beard in preparation for a court supervised lineup. Cinelli claims error in that (1) the indictments should have been dismissed under our decision in *Commonwealth v. Manning*, 373 Mass. 438 (1977), (2) certain statements he made to the police should have been suppressed, and (3) certain property seized during a search of his home under a search warrant should have been suppressed.³ Both defendants also argue that the Commonwealth's refusal to disclose certain evidence violated the mandates of *Brady v. Maryland*, 373 U.S. 83 (1963). We affirm the convictions.

³ Cinelli failed to include in the record copies of the findings and rulings of the judge on the motions to suppress, as well as a copy of the application for the search warrant which he claims to be insufficient to establish probable cause to search his home. See Mass. R. A. P. 18 (a), as amended, 378 Mass. 925 (1979). We have, however, obtained copies of these documents as part of our review of the issues raised. See Mass. R. A. P. 8 (a), as appearing in 378 Mass. 924 (1979).

5. *Right to counsel.* Cinelli claims error in the denial of his motion to dismiss the indictments against him. He argues that a postarraignment interview conducted at the Billerica house of correction by two detectives constituted a wilful interference with his constitutional right to counsel and to a fair trial. He asserts that the appropriate remedy is dismissal of the indictments.

The facts, as found by the Superior Court judge who heard the motion, are as follows. On May 12, 1981, Detective Michael Cutillo of the Revere police department, received a telephone call from an unidentified man who stated that Cinelli, who was incarcerated in an isolation section of the Billerica house of correction, wished to speak with him. Cutillo was acquainted with Cinelli, but he had only a minor role in the investigation of the robbery. Cutillo and his partner, Officer Robert Nunez, proceeded to Billerica and requested to speak with Cinelli.

A guard notified Cinelli and informed him of his right to either to refuse to speak with the detectives or to have his lawyer present. After signing a waiver form, Cinelli spoke to the detectives privately. The detectives told Cinelli that the Commonwealth's case appeared to be strong, that no lawyer would be able to help him, that he could spend one year in jail awaiting trial, that he would benefit by cooper-

ating with the police, and that he could be sentenced to life imprisonment if convicted. They also urged Cinelli to provide them with any information which would establish his innocence. Cinelli steadfastly maintained his innocence, stated that he had an alibi, and asserted that he had friends on the street who were trying to discover who committed the robbery. At Cinelli's request, the detectives permitted Cinelli, in their presence, to place a telephone call to those friends. Cinelli made a telephone call and talked with two individuals whom he identified as Thomas Lightbody and Rocco Costa. Cinelli advised Lightbody and Costa that they should feel free to speak with Cutillo if they so desired.

The detectives admitted that their purpose was to secure Cinelli's cooperation. The judge found that the detectives had reason to believe that Cinelli was represented by counsel. He found further that Cinelli had asked, during the course of the interview, where his lawyer was and had suggested that his lawyer should be present. The detectives made no effort to identify and locate Cinelli's lawyer.

In *Commonwealth v. Manning*, 373 Mass. 438 (1977), we dismissed the indictment against Manning because government agents engaged in a deliberate and intentional attack on the relationship between Manning and his counsel in a calculated attempt to coerce him into abandoning his defense. *Id.* at 443-445. During two telephone conversations with Manning, government agents had made disparaging remarks concerning Manning's counsel and the manner in which counsel was conducting Manning's defense, and indicated that the tactics of defense counsel would not ensure that Manning would stay out of jail. *Id.* at 440. We read the trial judge's findings in that case as indicating that Manning's relationship with his counsel had been impaired to some extent and refused to apply the harmless error rule. *Id.* at 443. We found it unnecessary, however, "to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial." *Id.* at 444.

The motion judge correctly found that the detectives acted in an improper manner.¹³ They had reason to know that Cinelli was represented by counsel. They continued to speak with Cinelli even after he suggested that his counsel should be present. Further, their remarks concerning the length of time Cinelli would spend in jail awaiting trial, the strength of the Commonwealth's case, and the length of a potential sentence were clearly improper. The question, however, is whether their conduct was sufficiently deliberate and egregious to require the dismissal of the indictments against Cinelli.

Cinelli argues, in reliance on *Manning*, that we should require the indictments to be dismissed even in the absence of any impairment of the attorney-client relationship or other prejudice to him.¹⁴ We do not think *Manning* reaches that

¹³The judge found: "While the detectives proceeded to the Billerica House of Corrections under the mistaken, but good faith belief that the defendant wished to see them, the detectives appeared to have taken unfair advantage of their visit even though it never became clear the defendant had not instigated the meeting. In an effort to secure the co-operation of the defendant in the ongoing investigation of the Medford robbery, police overzealousness gave way to impropriety. The court considers the detectives' comments regarding the strength of the Commonwealth's case against the defendant, the length of time possible before the defendant's trial date, and the suggestion that the defendant could receive a life sentence if convicted wholly inappropriate."

¹⁴Our discussion here is relevant solely to whether prejudice is necessary to warrant the dismissal of an indictment under art. 12 of the Massachusetts Declaration of Rights. In *United States v. Morrison*, 449 U.S. 361, 365 (1981), the United States Supreme Court held that there is no basis for dismissing an indictment under the Sixth Amendment in the absence of demonstrable prejudice or a substantial threat thereof even if the violation is deliberate. We read *Morrison* as settling the Federal constitutional issue. We also note that there is authority for the proposition that no violation of the Sixth Amendment occurs unless the prosecution benefits in some way from the intrusion on the attorney-client relationship. *United States v. Davis*, 646 F.2d 1298, 1303 (8th Cir.), cert. denied, 454 U.S. 868 (1981). *Mastrian v. McManus*, 554 F.2d 813, 821 (8th Cir.), cert. denied sub nom. *Mastrian v. Wood*, 433 U.S. 913 (1977). *Morrison* did not address the point. *United States v. Morrison*, *supra* at 364 (Court assumed the Sixth Amendment was violated). We will assume that the detectives' conduct violated both the Sixth Amendment and art. 12.

far. Our rejection of the harmless error rule in the circumstances of that case turned on the difficulty and dangers of engaging in precise calculations as to the amount of prejudice suffered. In this case there is no showing of any prejudice whatsoever.

Dismissal of indictments is a drastic remedy for official misconduct. In cases where we have not required a defendant to demonstrate prejudice, we permitted the Commonwealth to retry the defendant. See *Commonwealth v. Hodge*, 386 Mass. 165, 167-168 (1982); *Commonwealth v. A Juvenile* (No. 2), 384 Mass. 390, 392-394 (1981); *Commonwealth v. Tabor*, 376 Mass. 811, 819-820 (1978); *Commonwealth v. Johnson*, 365 Mass. 534, 547-548 (1974). Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice. Cf. *Pisa v. Commonwealth*, 378 Mass. 724, 729-731 (1979); *Commonwealth v. Sires*, 370 Mass. 541, 545-546 (1976).

We do not see the need in this case to formulate a broad prophylactic rule. While the conduct of the detectives was improper, we do not find here the degree of deliberateness and calculation which was present in *Manning*. The matter here was a single incident. Cinelli voluntarily had signed a waiver form consenting to the interview. The detectives were not actively involved in the investigation and did not disparage Cinelli's attorney. In many respects, their remarks accurately reflected Cinelli's position. In these circumstances, we choose not to adopt a per se rule.

Cinelli's second argument is that the motion judge's finding that he did not suffer prejudice is erroneous. Cinelli argues that the facts here are indistinguishable from those in *Manning* in that the conduct of the detectives irreparably impaired the attorney-client relationship at least to some extent. Our prior discussion of this matter is, we think, largely dispositive of this claim. See *United States v. Glover*, 596 F.2d 857, 861-864 (9th Cir.), cert. denied, 444 U.S. 860 (1979) (interview by government agents conducted without the permission of counsel which yielded no incriminating

statement or evidence did not warrant the remedy of dismissal). The court in *Glover* distinguished *Manning*, stating that "[t]he most damaging interference with the attorney-client relationship there was the impression the DEA agents attempted to convey that the defendant's counsel was incompetent. The effects of disparaging comments about counsel, particularly when coupled with a warning that reliance on counsel's judgment will not keep the defendant out of jail, can be detrimental to the attorney-client relationship and are not easily dispelled. Under such circumstances, a defendant may be deprived of the right to counsel." *Id.* at 861. Cf. *United States v. Irwin*, 612 F.2d 1182, 1188 (9th Cir. 1980).

We believe that the present circumstances are closer to those in *Glover* than in *Manning*.¹⁵ The remarks of the detectives were not calculated or of a nature to subvert the attorney-client relationship by leaving doubts as to the competence of defense counsel. Cinelli testified that he retained full confidence in the ability of his counsel. Finally, we note from our review of the record that defense counsel mounted a vigorous defense. We conclude that there was no impairment of the attorney-client relationship.

Last, Cinelli claims that, as a result of the interview, the Commonwealth learned the identity of a potential alibi witness, his codefendant Costa. The record does not bear out this claim. The Commonwealth had identified Costa as a possible suspect prior to this interview. Cinelli himself had mentioned Costa's name in his statement to the Medford police at the time of his arrest on May 7, 1981. The reference to Costa during the interview did not lead the Commonwealth to Costa and did not result in Costa's arrest and indictments. There was no error in the denial of the motion to dismiss.

¹⁵ We note that in *United States v. Morrison*, *supra* at 362, the government agents disparaged defense counsel. Yet the Court found no claim of continuing prejudice or a substantial threat thereof. *Id.* at 365 & n.2.

Appendix F

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS:

SUPERIOR COURT
CRIMINAL ACTION
NO. 81-1489 to
81-1492

COMMONWEALTH)
)
V.)
)
ARTHUR J. CINELLI)

MEMORANDUM OF DECISION ON DEFENDANT'S
MOTION TO DISMISS THE INDICTMENTS

This matter is before the court on the defendant's motion to dismiss the indictments on the grounds that he has been denied his right to counsel and his right to a fair trial. The defendant alleges that he was "interrogated" against his will at the Billerica House of Corrections without his lawyer present, thereby interfering with the attorney-client relationship. After careful consideration of the testimony of the witnesses at the hearings on this motion, the arguments of counsel and the memoranda submitted by both parties, the court makes the following findings and rulings.

1. *Findings of Fact*

On May 2, 1981, an armed robbery took place at the Bay Bank Middlesex on Mystic Avenue in Medford, Massachu-

setts. During the course of the armed robbery, Sergeant Richard McGlynn of the Medford Police Department was shot and seriously wounded by two men. Immediately after the incident, an extensive investigation was begun by the state police and several local police departments from the metropolitan Boston area, including Somerville, Revere, Malden, Chelsea, and Boston. The investigation was co-ordinated by the Medford Police Department.

As a result of this investigation, law enforcement officials arrested the defendant-Cinelli on May 7, 1981. Later that same day, the defendant was arraigned in the Somerville District Court, where he was represented by court-appointed counsel. At some point after the defendant's arraignment, his family retained Mr. Edward McCormick as his counsel, and Mr. McCormick represented the defendant at a bail review hearing at Middlesex Superior Court on May 8, 1981. Since this time, Mr. McCormick has remained the defendant's counsel.

Between May 7 and May 12, 1981, the police investigation into the armed robbery continued. During this same period the defendant, who was unable to raise sufficient money for bail, was incarcerated at the Billerica House of Corrections in an isolation section of the facility.

At approximately 7:15 p.m. on May 12, 1981, Detective Michael Cutillo of the Revere Police Department claims to have received an anonymous telephone call at the Revere Police Department from a male individual who indicated that the defendant wished to speak with him at Billerica. At the time of the alleged call, Detective Cutillo had played only a limited role in the investigation of the Medford armed robbery. However Cutillo, in his capacity as a uniformed police officer, had known the defendant for a number of years in the course of making various arrests of him. Detective Cutillo had also "worked" with the defendant on a murder case to which the defendant was allegedly an eyewitness. The defendant ultimately refused to testify for the prosecution in that case, and

the relationship between Cutillo and the defendant on May 12, 1981 could properly be characterized as hostile.

After receiving the anonymous call on May 12th, Detective Cutillo contacted the Medford Police Department to inquire if there was any objection to Cutillo's going to Billerica to see the defendant. Cutillo was advised there were no objections, and he and his partner Detective Robert Nunez thereupon proceeded to the House of Corrections. Somewhere in the vicinity of 8:30 to 9:00 p.m., the two detectives arrived at the Billerica House of Corrections. The detectives informed the desk officer there of the purpose for their visit. The officer presented Detectives Cutillo and Nunez with a blank waiver sheet to which they printed their names in the spaces numbered "1" and "2". (See Exhibit 1 appended to this decision.) The desk officer then arranged to have the defendant brought from his cell to the reception area within the prison.

At the Billerica jail the defendant was being held in solitary confinement in an area known as the "hole". The defendant's cell was dark, his bed had no sheets or blankets, and the defendant was fed inside his cell. The defendant was allowed no phone calls, but he was permitted out of the cell for one hour a day to see visitors, who included his mother and a friend named Rocco Costa.

As the defendant was taken from his cell the evening of May 12, just before he was brought down to the reception area where Detectives Cutillo and Nunez were waiting, the defendant was presented with the waiver sheet upon which the detectives had printed their names. The defendant was told that two Revere police officers were there to see him, that the defendant did not have to talk to them, and that the defendant was entitled to have his lawyer present if he wished to speak with the detectives.

The defendant looked down at the waiver form for approximately 20 to 30 seconds and gave the appearance of reading it. In relevant part the waiver form (i.e. Exhibit 1, appended) states:

"TO THE INMATE"

Under your constitutional rights you do not need to talk to any officer without your lawyer being present. Whether you talk to the above officer(s) or official(s) or not, please indicate and sign."

After this statement on the waiver form, two short sentences and signature blanks appear. One sentence reads: "I will voluntarily talk to the above official(s)", and the other says "I will not voluntarily talk to the above official(s)". After looking at the waiver sheet, the defendant signed the sheet after the sentence stating "I will voluntarily talk to the above official(s)".

Upon the defendant's signing the waiver sheet, he was escorted to a reception area where he met with detectives Cutillo and Nunez. The detectives and the defendant were then left alone to speak in private.

The substance of the conversation which thereafter ensued is not substantially in dispute. The defendant maintained his innocence throughout the entire conversation. He steadfastly denied any involvement in the armed robbery and indicated that he possessed an alibi. The detectives advised the defendant that the Commonwealth's case against him appeared to be strong. The detectives intimated that no lawyer would be able to help the defendant, that the defendant could spend up to a year in jail awaiting trial, and that the defendant would benefit by cooperating with the police in identifying other participants in the crime. The detectives told the defendant he could receive a life sentence for the crime he was charged with.

The detectives further informed the defendant that if he did not commit the armed robbery, they did not wish to see him convicted. They stated that if the defendant was not guilty, he should give the detectives any further information that could be helpful in establishing his innocence. The defendant replied

that he had friends on the street who were trying to find out who committed the robbery. The defendant Cinelli identified two of these individuals named Costa and Lightbody. He asked for and was granted permission to telephone these individuals in the presence of the detectives, and the defendant advised Costa and Lightbody that they could speak to Detective Curillo [sic] if they wished to.

At the time the conversation of May 12th took place, Detectives Cutillo and Nunez had reason to believe the defendant was represented by counsel and knew that the defendant had the right to have counsel present during their jailhouse interview. Both detectives admit their purpose in visiting the defendant was to see if he would co-operate with the police investigation, although the detectives claim they went to Billerica believing the defendant had requested to see them. At some point during the conversation, the defendant asked where his lawyer was and suggested that his lawyer should be present. Both detectives deny having known the identity of the defendant's counsel when they visited the defendant on May 12th, and neither detective made any attempt to identify or locate the defendant's attorney before or during the May 12th meeting.

II. Rulings of Law

In the present case, two general issues are raised by the defendant: 1) whether the purported waiver introduced by the Commonwealth was voluntary and effective, and 2) whether the conduct of the police "interrogators" requires dismissal of the defendant's indictments. In the ensuing opinion, the court will discuss each separately.

A.) Effectiveness of Waiver

It is a well established and fundamental principle of criminal law that any waiver of citizens' constitutional rights must be made "voluntarily, knowingly and intelligently". *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). It is equally clear that

the burden is upon the Commonwealth to show that any such waiver was so made. *Commonwealth v. Hosey*, 368 Mass. 571, 574 (1975). "The government has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his right to counsel." *Commonwealth v. Richmond*, Mass. Adv. Sh. (1980) 167, 169. See, *Commonwealth v. Watkins*, Mass. Adv. Sh. (1978) 1646, 1663-1664. Every reasonable presumption is indulged against a defendant's making a constitutional waiver. *Commonwealth v. Hooks*, Mass. Adv. Sh. (1978) 1356, 1360; *Johnson v. Zerbat*, [sic] 304 U.S. 458, 464 (1938).

In considering whether a defendant made a knowing and intelligent waiver, the court is to consider "the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation" — in reaching a judgment. *Commonwealth v. Daniels*, 366 Mass. 601, 606 (1975), quoting from *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). See also, *Commonwealth v. Davis*, Mass. Adv. Sh. (1980) 555, 557.

In view of the totality of circumstances in the present case, the court is of the firm belief that the defendant's waiver of counsel prior to his conversation with Detectives Cutillo and Nunez on May 12, 1981, was voluntarily, knowingly and intelligently waived. In the first instance the court notes that the defendant Cinelli, while an individual of relatively young age (i.e. 20 years old), has had considerable dealings with law enforcement officers. The defendant has been arrested on numerous occasions, has been advised of his Miranda rights, and has invoked those rights in his discretion. On the day of his arrest on the instant indictments, for example, the defendant gave a written statement which he later refused sign because his lawyer wasn't present.

Regarding the second aspect of the "totality" standard expressed in *Daniels*, *supra*, (i.e. the details of interrogation)

the question is a closer one. Waivers in custodial settings or in coercive circumstances must be examined with great scrutiny to assure the protection of the defendant's constitutional rights. See generally, *Commonwealth v. Collins*, Mass. App. Ct. Adv. Sh. (1981) 29. In the present case, the defendant was incarcerated in solitary confinement and has testified to having contemplated suicide. The defendant claims he did not understand the waiver form he signed on May 12th and that even if he did, he would have signed anything to get out of solitary confinement.

While these circumstances appear coercive, however, no evidence before the court has diminished the fact that the defendant did indeed sign a waiver form on May 12. The waiver form handed the defendant concisely described his constitutional rights, and the defendant gave every appearance of reading those rights before he signed his name to the waiver. In addition, a security guard verbally appraised the defendant of his rights to an attorney and to remain silent before he agreed to speak with Detectives Cutillo and Nunez. There is no evidence that the defendant was promised alternative confinement outside of his isolated cell for any period longer than his interview with the detectives, and the defendant's claim that he would sign anything to leave solitary confinement for only a brief period seems unreasonable. To render ineffective the defendant's waiver is to ignore the clear import of his actions in listening to the security guard's verbal warnings, in reading the waiver form, and in writing his signature next the line reading "I will voluntarily talk to the above official(s)." The weight of the evidence does not support such a finding. "Explicit statements that the defendant understood his rights and waived them are not essential. *Commonwealth v. Harris*, Mass. App. Ct. Adv. Sh. (1981) 77, 85. See also, *Commonwealth v. Valliere*, 366 Mass. 479, 487 (1974); *Commonwealth v. Williams*, Mass. Adv. Sh. (1979) 1431, 1441 n.7. "(I)n

particular circumstances, an individual may waive his previously asserted desire to consult counsel." *Commonwealth v. Richmond*, Mass. Adv. Sh. (1980) 167, 169. See, *Commonwealth v. Watkins*, *supra* at 1662-1663.

In light of the testimony of the defendant and the guard present when the defendant executed the waiver form, the court concludes that the Commonwealth has met its heavy burden of establishing that the waiver here was made "voluntarily, knowingly and intelligently." *Miranda v. Arizona*, *supra* at 444.

B.) *Remedy of Dismissal*

Defense counsel urges that even if the defendant waived his right to have counsel present at the interview of May 12, the defendant did not consent to the detectives' subsequent attack on his defense and on the defendant's chances at trial. Because the detectives arguably intruded the attorney-client relationship, the defendant claims the indictments against him must be dismissed with prejudice. See, *Commonwealth v. Manning*, 373 Mass. 438 (1977).

From the outset, the court wishes to emphasize its disfavor with the manner in which the detectives conducted their interview with the defendant. While the detectives proceeded to the Billerica House of Corrections under the mistaken, but good faith belief that the defendant wished to see them, the detectives appeared to have taken unfair advantage of their visit even though it never became clear the defendant had not instigated the meeting. In an effort to secure the co-operation of the defendant in the ongoing investigation of the Medford robbery, police overzealousness gave way to impropriety. The court considers the detectives' comments regarding the strength of the Commonwealth's case against the defendant, the length of time possible before the defendant's trial date, and the suggestion that the defendant could receive a life sentence if convicted wholly inappropriate.

While it is true the defendant could have cut off the conversation at any point, and the defendant here elected not to do so, the defendant did make a reference to his attorney being absent and questioned whether the detectives' suggestions were proper. The right to cut off questioning is a "critical safeguard" — *Michigan v. Mosley*, 423 U.S. 96 (1975) — and that right is "scrupulously honored" in this Commonwealth. See, *Commonwealth v. Brant*, Mass. Adv. Sh. (1980) 1473, 1479-1483; *Commonwealth v. Dustin*, 373 Mass. 612, 616 (1977), cert. denied, 435 U.S. 943 (1978). Once the defendant here made reference to his rights of counsel, the detectives should not have pursued any additional conversation whatsoever. Furthermore, even before the defendant Cinelli alluded to the absence of his attorney, the detectives did not have the right to direct the conversation in a manner disparaging to Cinelli's defense. See generally, *Commonwealth v. Manning*, *supra*.

If the remedy sought by the defendant arose in the context of a motion to suppress incriminating statements of the defendant in his conversation with the detectives, the court would have no trouble in siding with the defendant. See, *Commonwealth v. Brant*, *supra*, at 1479-1483. The remedy sought by the defendant in the present case, however, is dismissal of all indictments against him. The court concludes that dismissal in the present case is unwarranted.

The court is instructed by a relatively recent holding of the U.S. Supreme Court in the case of *United States v. Morrison*, U.S. , 101 S.Ct. 665 (1981). In *Morrison*, a defendant who had been indicted on federal drug charges moved to dismiss her indictment with prejudice on the grounds that the conduct of federal agents violated her Sixth Amendment right to counsel. The Supreme Court held that even assuming the Sixth Amendment was violated by the federal agents' action of meeting with the defendant without her counsel's knowledge or permission and in the agent's seeking the defendant's co-

operation in a related investigation, dismissal of the defendant's indictment was unjustified. In so holding, the Court stated:

"(W)ithout detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests . . .

"Our approach has thus been to identify and then neutralize the taint by tailoring suitable relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

"*More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.*" (emphasis added)

United States v. Morrison, *supra* at 668.

The present case appears analogous to the situation in *Morrison* in that no specific evidence of prejudice has been shown by the defendant. The defendant did not make any incriminating statements during the May 12th interview, and has at all

times maintained his innocence. The defendant has testified that he has not lost confidence in his attorney, he is willing to pursue his defense through trial, and he is hopeful for acquittal.

Defense counsel claims *Morrison* is inapplicable in view of the more stringent standards set in this Commonwealth by the Supreme Judicial Court's *Manning* decision. The court, however, declines to accept the defendant's suggestion that *Manning* establishes a per se rule of dismissal whenever police improperly interrogate an individual as to his impending defense. Language in the *Manning* decision itself contradicts such a reading.¹

Moreover, the circumstances in *Manning* are readily distinguishable from the case at bar. In *Manning*, there was a "deliberate and intentional attack by government agents on the relationship between Manning and his counsel in a calculated attempt to coerce the defendant into abandoning his defense". *Id.* at 443. In the present case, the detectives proceeded to the Billerica House of Corrections on the good faith belief that the defendant Cinelli had requested a meeting. The detectives had not calculated to subvert Cinelli's defense, and the conversation which ensued was not of the detectives' instigation but that of an anonymous caller's.

Further, unlike the situation in the *Manning* case, the defendant here executed a written waiver of his right to counsel prior

¹ Near the conclusion of its opinion, the Supreme Judicial Court noted: "It may be that the only way to prevent such offensive and deliberate manipulation of criminal defendants is to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial. In the case now before us, we find it necessary to adopt such a rule." *Commonwealth v. Manning*, *supra*, at 444.

to his meeting the detectives.² This waiver had the effect of putting the defendant on notice of his constitutional rights and apparently did so to the extent that the defendant later alluded to the absence of his lawyer when conversing with the detectives. In *Manning*, the detectives made a deliberate attempt to undermine the defendant's attorney-client relationship. In the present case, Detectives Cutillo and Nunez made no disparaging remarks about the defendant Cinelli's counsel. Lastly, the governmental interest which lies in the balance in the instant case is far greater than that presented in *Manning*. Here, dismissal would preclude the Commonwealth from trying the guilt or innocence of a defendant charged with the life felony of armed robbery as well as the most serious charge of armed assault with the intent to murder a police officer. In *Manning*, the defendant was indicted for distributing cocaine and, while awaiting trial, the defendant had served a considerable period of time in prison against any jail time for which he could have potentially been sentenced.

Certainly the right to counsel is a substantial right, and the absence of prejudice alone may constitute an insufficient grounds for denying relief where constitutional violations occur *Commonwealth v. A Juvenile*, Mass. Adv. Sh. (1981) 1958, 1960-1961. As the Supreme Judicial Court in *Manning* noted, "any violation of a constitutional right gives rise to presumptive prejudice, which normally requires a reversal of the conviction, in the absence of an affirmative showing by the Commonwealth that the error was harmless." *Commonwealth v. Manning*, *supra* at 443, citing *Commonwealth v. McDonald* (No. 1), 368 Mass. 395, 399 (1975).

In the present case, however, the court is persuaded that the Commonwealth has made an affirmative showing that the

² Contrast, *Edwards v. Arizona*, U.S. , 101 S.Ct. 1880 (1981), where an incarcerated defendant said that he did not want to speak to detectives, but the prison guard told the defendant that "he had" to talk to the detectives.

38a

detectives' error here was harmless and that the defendant Cinelli was not prejudiced. In this light and in accordance with the foregoing analysis, the court concludes that the defendant's motion to dismiss all criminal indictments against him must be DENIED.
SO ORDERED

By the Court,

/s/Paul K. Connolly
Justice of the Superior Court

Entered: September 11, 1981

ORIGINAL

Supreme Court, U.S.
FILED

APR 19 1988

In the Supreme Court of The United States

JOSEPH F. SPANIO, JR.
CLERK

October Term, 1979

No. 87-725

Michael Cutillo and Robert Nunez,
Petitioners

V.

Arthur J. Cinelli
Respondent

On A Petition For A Writ Of Certiorari To The United States Court
of Appeals For the First Circuit

Memorandum For (The Respondent)
In Opposition

Petitioners contend that the United States Court of Appeals for the First Circuit erred in ruling that once the respondent-plaintiff had shown the disclosure of defense information during the interrogation of the defendant, the burden shifted to the government to show that there was no prejudice to the defendant. (Pet. 7-8;) (Pet.App. 8A, 820 F.2d 478)

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 617
520-0333

STATEMENT OF THE CASE

The facts are, for the most part, not in dispute. In support of their Motions for Summary Judgment, Cutillo and Nunez submitted a transcript of Cinelli's hearing on a Motion to Dismiss which took place in the Superior Court Department of the Massachusetts Trial Court. Appellees, also relied upon that Court's findings of fact and the decision of the Supreme Judicial Court affirming the Superior Court's denial of Cinelli's Motion to Dismiss. (Pet.App. 18A-25A; 26A-38A)

On May 7, 1981, the appellant Cinelli was arrested and charged with armed robbery and assault with intent to murder. Later that day, he was arraigned in the Somerville District Court, where he was represented by court-appointed counsel. On May 8, Cinelli appeared at a bail review hearing in the Middlesex Superior Court. At this time he was represented by Edward J. McCormick, III, who has remained his counsel since that time.

Unable to post bail, Cinelli was incarcerated at the Billerica House of Correction in an isolation section of the facility.

On May 12, 1981, Detective Michael Cutillo claims to have received an anonymous telephone call from an individual who indicated that Cinelli wished to speak with him. At the time of the alleged call, Cutillo had played only a limited role in the investigation of the armed robbery. However, Cutillo, in his

capacity as a uniformed police officer, had known the defendant for a number of years, and the relationship between Cutillo and Cinelli on May 12, 1981 could properly be characterized as hostile.

At that point Detective Cutillo contacted the Medford Police Department to inquire as to whether there was any objection to his going to the jail to interrogate Mr. Cinelli. Cutillo was advised that Medford had no objections and with Detective Nunez, proceeded to Billerica jail.

Mr. Cinelli was at the time being held in solitary confinement, more commonly known as the hole. The defendant's cell was dark, his bed had no sheets or blankets and the defendant was fed inside his cell.

The defendant was allowed no phone calls, but he was permitted out of the cell for one hour a day to see visitors, who included his mother and a friend named Rocco Costa.

As the defendant was taken from his cell the evening of May 12, just before he was brought down to the reception area where Detective Cutillo and Nunez were waiting, the defendant was presented with a waiver sheet on which the detectives had printed their names. The Defendant was told that two Revere police officers were there to see him, that the defendant did not have to talk with them, and that the defendant was entitled to have his lawyer present if he wished to speak with the detectives.

The defendant looked at the waiver sheet for approximately twenty to thirty seconds and appeared to be reading it. In relevant part the waiver form (i.e. Exhibit 1, appended) states:

"TO THE INMATE"
Under your constitutional rights you do not need to talk to any officer without your lawyer being present. Whether you talk to the above officer(s) or official(s) or not, please indicate and sign".

After this statement on the waiver form, two short sentences and signature blanks appear. One sentence reads: "I will voluntarily talk to the above official(s)", and the other says, "I will not voluntarily talk to the above official(s)". The Defendant then signed the waiver indicating that he would voluntarily talk to the detectives.

At that point he was escorted to the reception area where he met Cutillo and Nunez. The detectives and the defendant were then left alone to speak in private.

The substance of the conversation which thereafter ensued is not substantially in dispute. The defendant maintained his innocence, steadfastly denying any involvement in the armed robbery and indicating that he had an alibi. The detectives told Cinelli that the case against him appeared to be strong, that no lawyer would be able to help him, that he would spend up to a year in jail awaiting trial, that he could receive a life sentence if convicted, and that he would benefit by cooperating

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 517
520-0333

with the police in identifying the other participants in the crime. The detectives also informed Cinelli that if he did not commit the armed robbery, they did not wish to see him convicted, and that if he was not guilty, he should give the detectives any information that could be helpful in establishing his innocence. Cinelli replied that he had friends on the street who were trying to find out who committed the robbery and identified two of them named Costa and Lightbody. At Cinelli's request, the detectives permitted Cinelli, in their presence, to telephone Costa and Lightbody. He advised them that they could speak to Cutillo if they wished. Within days after this interrogation Costa was indicted and renamed as a co-defendant.

At the time of the May 12 conversation, Cutillo and Nunez had reason to believe Cinelli was represented by counsel and knew that he had the right to have counsel present during the interview. The detectives' purpose in visiting Cinelli was to see if he would cooperate with the police investigation, although they went to Billerica believing Cinelli had asked to see them. At some point during the conversation, Cinelli asked where his lawyer was and suggested that his lawyer should be present. Both detectives deny having known the identity of Cinelli's counsel, and did not attempt to identify or locate Cinelli's attorney before or during the the May 12th meeting. (Pet.App.26A-38A).

Cinelli filed an action pursuant to 42 U.S.C. §1983

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 517
520-0333

claiming damages for the police misconduct depriving him of his Constitutional rights as guaranteed by the Sixth and Fourteenth Amendments. The United States District Court granted summary judgment finding there was no issue of genuine fact in dispute and that Cinelli had not established prejudice. The United States Circuit Court of Appeals for the First Circuit reversed the District Court holding that there did exist genuine issues of fact and that it was erroneous to place the burden of proof upon Cinelli to establish prejudice, once he had established a prima facie case that a constitutional violation had occurred.

The petitioners argue that the First Circuit decision would "inevitably distort the substantive definition of what conduct constitutes a violation of the Sixth Amendment." This position is without merit. The First Circuit held not that there was a Sixth Amendment violation, but that there existed a genuine issue of fact as to whether Cinelli suffered prejudice as a result of the police misconduct. Thus, the case should go back to the District Court for a proper determination of applicable facts. In the instant matter, if a fact finder were to determine that the Commonwealth learned of Cinelli's intention to put forth an alibi defense as a result of the misconduct, then such a factual determination may well warrant a finding of prejudice. However, the First Circuit was reviewing a summary judgment decision and thus only found that the District Court was in error

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 617
520-0333

in finding that there was genuine issue of fact. Such a ruling does not warrant this Court's review.

The petitioners contention that there exists a conflict among the Circuits regarding the rule as to the burden of proof in establishing prejudice in Sixth Amendment claims, would however appear to have merit. A review of numerous Circuit decisions indeed indicates that the First Circuit decision in shifting the burden of proof is not in accordance with decisions by the Second, Sixth, Eighth and Ninth Circuits. See United States v. Dien, 609 F.2d 1038 (2d Cir. 1979); United States v. Steele, 727 F.2d 580 (6th Cir. 1983); United States v. Irwin, 612 F.2d 1182 (8th Cir. 1980); Clutchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985).

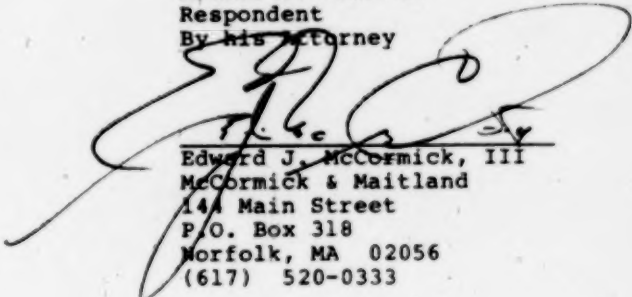
This Court in United States v. Morrison, 449 U.S. 361 (1981) did not directly address the question the burden of proof as it assumed a violation had occurred but a dismissal of the indictment was not warranted due to the absence of prejudice. Thus, it would appear that the Supreme Court has not ruled on the issue as to which party bears the burden of proof to establish prejudice and a Sixth Amendment violation is established.

However, this Court should not grant the writ as judicial economy would best be served by allowing the case to proceed to trial which factual determination may well dictate that the issue be moot.

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 617
520-0333

It is therefore respectfully submitted that the petition
for a writ of certiorari should be denied.

Respectfully Submitted
Arthur J. Cinelli
Respondent
By his Attorney



Edward J. McCormick, III
McCormick & Maitland
144 Main Street
P.O. Box 318
Norfolk, MA 02056
(617) 520-0333

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 617
520-0333

SUPREME COURT OF THE UNITED STATES

MICHAEL CUTILLO AND ROBERT NUNEZ *v.* ARTHUR
J. CINELLI

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-725. Decided May 2, 1988

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

In *Weatherford v. Bursey*, 429 U. S. 545, 558 (1977), we held that establishing a violation of a defendant's Sixth Amendment right to counsel requires a showing of "at least a realistic possibility" of prejudice to the defendant or benefit to the prosecution. See also *United States v. Morrison*, 449 U. S. 361, 365-366 (1981). This case presents the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information. The First Circuit held that where confidential defense strategy information is transmitted to the prosecution and the defendant makes a prima facie showing of prejudice, the burden then shifts to the prosecution to prove that there was no prejudice to the defendant from the disclosure. *Cinelli v. City of Revere*, 820 F. 2d 474, 478, 480 (1987); accord *United States v. Mastroianni*, 749 F. 2d 900, 907-908 (CA1 1984). This position conflicts with the approach of other Circuits of requiring the defendant to prove prejudice. *United States v. Steele*, 727 F. 2d 580, 586-587 (CA6), cert. denied *sub nom.* *Scarborough v. United States*, 467 U. S. 1209 (1984); *United States v. Irwin*, 612 F. 2d 1182, 1186-1189 (CA9 1980). It also conflicts with a third position that once a de-

fendant shows that the prosecution has improperly obtained confidential defense strategy information or has intentionally placed an informer in the defense camp then no showing of prejudice is required, for those acts constitute a *per se* violation of the Sixth Amendment. *United States v. Costanzo*, 740 F. 2d 251, 254-255 (CA3 1984), cert. denied, 472 U. S. 1017 (1985). Because of these conflicting approaches amongst the Circuits, I would grant certiorari.